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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1964

FRANK BASKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 456

FRANK BASSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Having waived trial by jury, petitioner was convicted after a non-jury trial in the Southern District of New York of having sold narcotics on July 11, 1962, and on April 29, 1963. He was sentenced as a second offender to concurrent terms of ten years' imprisonment. (R. I. 4-6, 8-9.) The conviction was affirmed on April 14, 1964. (R. II. 16.) A petition for rehearing was denied on May 4, 1964. (Pet. App. 17, R. II. 20-26.) The petition for a writ of certiorari was filed on June 5, 1964, and it is out of time under Rule 22-2 of the Rules of this Court.

In any event, the petition is without merit. The sole issue raised is whether the court, which was sitting as trier of the facts, was justified in rejecting

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petitioner's deposition testimony. The evidence may be summarized as follows.

Government agent McDonnell testified that on the evening of July 12, 1962, he was introduced to petitioner by an informant named Greene, and that he told petitioner that he wanted to obtain a quarter kilo of heroin. Petitioner said it would cost $1,700. McDonnell gave $100 to petitioner, who directed McDonnell and Greene to wait at Greene's house for a telephone call. Petitioner gave his telephone number to Greene and, at McDonnell's suggestion, Greene gave McDonnell's number to petitioner. R. 11, 4-5. Petitioner later telephoned agent McDonnell and Greene and told them that he had encountered difficulty in obtaining the "stuff" but that he did have some "other good stuff" for which the price would be $1,000 instead of $1,700. Petitioner then instructed for Greene to come to petitioner's car. Upon returning from petitioner's car, Greene gave McDonnell a package of heroin. R. 11, 7. On July 18 and 19, 1962, after receiving telephone calls from petitioner, McDonnell met with petitioner and paid him some of the purchase price. R. 11, 6-7. On July 23, after another telephone call from petitioner, McDonnell paid petitioner another $400. Petitioner then advised McDonnell that a "panic" shortage of narcotics was anticipated and urged McDonnell to buy another package. R. 11, 6-7. After receiving another telephone call from petitioner, McDonnell paid him the balance due on the original purchase. R. 11, 8.

Between August 1, 1962, and the middle of April 1963, petitioner telephoned McDonnell approximately

nine times, asking on each occasion if he was ready for another package. McDonnell replied that he was not (R. II, 8, 9, 10, 11).

On April 24, 1963, McDonnell and Greene met with petitioner, and McDonnell said that he had $1,000 and wanted another package. Petitioner replied that he could not obtain another quarter kilo, but that he could deliver four ounces of "something good" for $1,200. Petitioner then left and returned shortly thereafter, announcing that he had missed his "connection" and returning the $1,000 (R. II, 11–12). On the following day, petitioner telephoned McDonnell at Greene's home and arranged a meeting during which McDonnell entered petitioner's car and gave him $1,000 (R. II, 12-13). On April 26, at 9:30 p.m., petitioner telephoned McDonnell and informed him that the package of narcotics could be picked up in the telephone booth of a specified drugstore. McDonnell found the package there (R. II, 14).

On cross-examination McDonnell testified that he spent "quite a bit of time" in the home of Greene, the informant (R. I, 11-12). McDonnell had agreed with Greene that in dealing with petitioner they would attempt to convey the impression that they had been in jail together (R. I, 12-13).

Petitioner testified in his own behalf that he was released from the penitentiary at Lewisburg on April 3, 1961 (R. I, 13). He asserted that in June 1962 Greene had asked him if he could get Greene any "stuff," and that petitioner had replied, "No, I can't. I'm not fooling around in that no more" (R. I, 13-14).

A few days later, Greene made a similar request of petitioner, who again refused (R. I, 14, 17). Three or four days before July 14, 1962 (the date of the first sale), Greene told petitioner he had $4,500 and asked whether petitioner could get him "anything better" than the narcotics Greene had been buying. Petitioner then agreed and arranged the meeting for the narcotics sale with which he was charged (R. I, 15–16).

Greene was available as a witness but was not called by either side.

The court was clearly free to disbelieve petitioner's testimony that the sales were made only after Greene had persistently importuned petitioner. The substantial amounts involved and the attempts by petitioner to induce McDonnell to buy more narcotics indicated that petitioner was in the narcotics business. The entrapment issue was properly resolved against petitioner by the trier of fact. See *Masciale* v. *United States*, 356 U.S. 386; *Lopez* v. *United States*, 373 U.S. 427.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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